The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

ISSUED: August 20, 2004

D.T.E. 01-70

Complaint of Fiber Technologies Networks, L.L.C., pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.00 et seq. regarding access to poles owned or controlled by Shrewsbury's Electric Light Plant.

ORDER ON FIBERTECH'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF PARTIAL DENIAL OF MOTION FOR SUMMARY JUDGMENT AND FINAL ORDER

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I. INTRODUCTION

Fiber Technologies Networks, L.L.C. ("Fibertech") brought a pole attachment complaint before the Department of Telecommunications and Energy ("Department") against Shrewsbury's Electric Light Plant ("SELP"), seeking a ruling that SELP is obligated to enter into pole attachment agreements with it under the Massachusetts pole attachment statute and the Department's regulations. G.L. c. 166, § 25A; 220 C.M.R. § 45.00 et seq.. On December 24, 2002, the Department ruled on a motion by Fibertech for summary judgment and on Fibertech's appeals from the hearing officer's discovery rulings. D.T.E. 01-70, Interlocutory Order. The Department granted Fibertech's motion for summary judgment, in part, holding that dark fiber qualifies as an "attachment" under the pole attachment statute and regulations. Interlocutory Order at 28. The Department denied the motion, in part, because the Board of Selectmen of the Town of Shrewsbury had not acted upon Fibertech's petition for authority to construct its fiber optic cables in Shrewsbury, pursuant to G.L. c. 166, §§ 21, 22, and therefore, the Department could not hold that Fibertech is a pole attachment "licensee" within the meaning of G.L. c. 166, § 25A. Interlocutory Order at 24. The Department opted to continue to review Fibertech's complaint on the ancillary issue of whether Fibertech is incorporated for the transmission of intelligence.[1] Id. at 24-25. The Interlocutory Order also upheld the hearing officer's rulings on motions to compel responses to information requests. Id. at 37, 45-46.

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[1] A company that is "incorporated for the transmission of intelligence" may seek local construction authority under G.L. c. 166, §§ 21, 22.

On January 13, 2003, Fibertech filed a motion for reconsideration and clarification of the Interlocutory Order ("Motion").[2] Fibertech sought reconsideration of the Department's ruling that Fibertech could not be considered to be a licensee until the Board of Selectmen of Shrewsbury approved a grant of location, arguing that the Department overlooked the industry custom and practice of having pole attachment agreements and licenses in place before obtaining municipal construction authority (Motion at 2). Fibertech also sought clarification of the Department's ruling to investigate whether Fibertech is in the business of transmission of intelligence, arguing that it is unclear what facts are in dispute, given the Department's ruling that dark fiber qualifies as an attachment (id.). On January 27, 2003, SELP filed its opposition to Fibertech's Motion ("Opposition").

While Fibertech's motion was pending, the Department's Telecommunications Division, in the course of its administration of tariff filings, sought to clarify its tariff filing requirements. On August 12, 2003, after seeking comments from all Massachusetts telecommunications carriers regarding the Department's jurisdiction under G.L. c. 159, § 12 and regarding carriers' obligations to file wholesale tariffs, the Telecommunications Division directed all carriers to file tariffs within 90 days for all intrastate wholesale telecommunications services that they are offering as common carriage. Clarification of Wholesale Tariffing Requirements, Memorandum to Massachusetts Telecommunications Carriers and Interested Persons at 8 (Telecommunications Division, August 12, 2003) ("Wholesale Tariffing

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[2] On January 10, 2003, Fibertech filed a motion to extend the time to file its discovery responses until the Department has ruled upon Fibertech's motion for reconsideration and clarification. This Order renders all discovery disputes moot.

Memorandum"). The Wholesale Tariffing Memorandum advised carriers that the Department adopted the common carriage test established by National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I") and its progeny in determining who is a "common carrier" obligated to file tariffs under G.L. c. 159, § 19.[3] On November 10, 2003, Fibertech issued a schedule of tariffs for intrastate wholesale telecommunications services, M.D.T.E. 3. The Department permitted the tariff to take effect on December 10, 2003. G.L. c. 159, § 19.

Because this new tariff potentially affected the Department's review of Fibertech's motion for reconsideration and clarification of the Interlocutory Order, the Department directed the parties to file comments on the effect of Fibertech's M.D.T.E. 3 on this proceeding (Procedural Memorandum at 1 (December 15, 2003); see also Hearing Officer Ruling on SELP's Motion for Extension of Time to File Comments at 1-2 (December 31, 2003)). Specifically, the Department directed the parties to address, at a minimum, the wholesale tariff's effect on the determination of (1) whether Fibertech is a "licensee," and (2) whether Fibertech is "incorporated for the transmission of intelligence" (Procedural Memorandum at 1 (December 15, 2003)). Fibertech filed comments on January 6, 2004 ("Fibertech Comments"). SELP filed comments on January 20, 2004 ("SELP

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[3] Under this two-part test, common carrier status turns on (1) whether the carrier offers telecommunications services indiscriminately to all potential users of the service, and (2) whether the carrier allows customers to transmit intelligence of their own design and choosing. Wholesale Tariffing Memorandum at 6, citing U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002).

Comments").[4] Fibertech filed reply comments on February 3, 2004 ("Fibertech Reply Comments"). The Department now considers these comments in conjunction with the two issues raised in Fibertech's motion for reconsideration and clarification.

II. STANDARD OF REVIEW

The Department's procedural rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would warrant a material change to a decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric

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[4] SELP included in its comments a request to strike portions of Fibertech's comments as merely supplementing or rearguing points already made in Fibertech's original motion for reconsideration and not relevant to the effect of M.D.T.E. 3 on this proceeding (SELP Comments at 2-3, exh. 1). Fibertech counters that those comments are intended to amplify the issues that continue to be relevant notwithstanding the Wholesale Tariffing Memorandum (Fibertech Reply Comments at 3). Although we strike those portions of Fibertech's comments as not responsive to the Department's request for comments on the effect of the Wholesale Tariffing Memorandum and M.D.T.E. 3, we will still consider the issues to the extent that they were raised by the original motion for reconsideration.

Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is sufficiently ambiguous to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

III. LICENSEE STATUS

A. Positions of the Parties

1. Fibertech

Fibertech argues that the Department should reconsider its ruling that Fibertech could not be considered to be a licensee until it has first obtained a grant of location on the grounds that this finding is contrary to "industry custom and practice." Fibertech claims that "the custom and practice in the telecommunications industry is to have pole attachment agreements and licenses in place before obtaining municipal grants of location" (Motion at 3 (emphasis in original)). Fibertech asserts that the pre-filed testimony of Frank Chiano, Fibertech's Chief Operating Officer, presents evidence of this custom and practice (id. at 3-4). Fibertech also claims that, for example, the policy of the Boston Public Improvements Commission is that "telecommunications providers are required to have their private agreements in place before seeking public authority for locations in the public ways" (id. at 4 (emphasis in original), citing Cablevision v. Public Improvements Commission, 184 F.3d 88, 91 (1st Cir. 1999)). Therefore, Fibertech maintains that, according to industry custom and practice, the telecommunications provider and the utility first enter into a "pole attachment agreement" establishing the terms and conditions on which to obtain "licenses" to attach to specific poles in the utility's service area (Motion at 4). According to Fibertech, before the license can be issued, pole surveys and make-ready work estimates are performed (id. at 4-5). Fibertech claims that "[o]nly once this preliminary work is done can the attaching entity finalize a route – and know what grants of location to apply for" (id. at 5).

Fibertech states that the Interlocutory Order "appears to assume that the grant of a pole attachment license confers actual access, not just the right of access as against the utility" (Motion at 6). Fibertech contends that once that "right" is granted, it will still need to obtain "licenses" for specific attachments and grants of location, and that so long as local permits, such as grants of location from the board of selectmen, or construction and street cut permits from public works departments are required, the industry custom and practice is consistent with G.L. c. 166, §§ 21 and 22 (id.).

Finally, Fibertech argues that the Interlocutory Order is contrary to the Department's certification to the Federal Communications Commission ("FCC") that it regulates "nondiscriminatory access to any pole, duct, conduit, or right-of-way" owned by a utility, preempting the FCC's jurisdiction to regulate pole attachments in Massachusetts (Motion at 7, citing 47 U.S.C. § 224(f)). Fibertech argues that Section 224 of the Communications Act requires utilities to provide all telecommunications providers with nondiscriminatory access to poles, conduits, and rights-of-way without reference to local right-of-way permitting (Motion at 7).[5] Fibertech argues that if the Department does not regulate nondiscriminatory access to such facilities, then the FCC would retain jurisdiction (id.). Fibertech maintains that the Interlocutory Order suggests that a company could be a "telecommunications provider" entitled to an attachment under 47 U.S.C. § 224, and still not qualify as a "licensee" under

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[5] Fibertech states that 47 U.S.C. § 253 "preserves local authority" for right-of-way permitting that is "nondiscriminatory and competitively neutral and does not impose unreasonable barriers to entry" (Motion at 7). Fibertech argues that administration of grants of location under G.L. c. 166, §§ 21 and 22 must "conform to these federal requirements" (id.).

Massachusetts law. Therefore, Fibertech concludes that the Interlocutory Order does not provide the same access provided under Section 224, thus creating circumstances in which the FCC would have jurisdiction, contrary to the purpose of the Department's Pole Attachment Regulations (Motion at 7).

Fibertech does not claim that the filing of M.T.D.E. 3 affects the issue of whether obtaining a municipal grant of location, pursuant to G.L. c. 166, § 22, is a condition precedent to being a "licensee" within the meaning of G.L. c. 166, § 25A (Fibertech Comments at 3-4). Rather, Fibertech asserts that the Department already established under G.L. c. § 166, § 21 that a company incorporated for the transmission may construct lines in public ways, and that this "state authority" should have been sufficient for the Department to conclude that such a company is a "licensee" within the meaning of G.L. c. 166, § 25A (id.).

2. SELP

SELP argues that the Department should deny Fibertech's Motion for Reconsideration because reconsideration of an interlocutory order is inappropriate (Opposition at 1). SELP notes that the Department's regulations make clear that a motion for reconsideration may be filed only in connection with a "final Department Order" (id. at 3, citing 220 C.M.R. § 1.11(10)). SELP further notes that the Department's general rule against reconsideration of interlocutory orders is based on the principle of administrative efficiency, because the Department needs the "ability to make final determinations and carry out its regulatory duties without being hampered by reconsideration of every procedural and interlocutory decision" (id. at 4, citing G.L. c. 30A; Boston Edison Company, D.P.U. 96-23-A at 7 (1997)). SELP

argues that an order adjudicating fewer than all of the claims of the parties is interlocutory, not final, and therefore not immediately reviewable until a final decision is entered (Opposition at 3-4, citing UNE Rates, Interlocutory Order, D.T.E. 01-20 (October 18, 2001); D.P.U. 96-23-A at 6; Mass. R. Civ. P. 54(b)).

SELP further argues that even if the Department were able to review Fibertech's Motion for Reconsideration, the Motion does not meet the Department's standard of review (Opposition at 5). SELP argues that Fibertech's Motion does not bring to light previously unknown or undisclosed facts, but rather, attempts to reargue its summary judgment motion on different grounds raised for the first time in the Motion for Reconsideration, i.e. that the pre-filed testimony of Frank Chiano is "evidence" of industry practices in support of the motion for summary judgment (id. at 6).[6]

SELP argues that Mr. Chiano's testimony that two other utilities did not require Fibertech to "obtain local municipal authorizations prior to obtaining attachment agreements" only demonstrates Fibertech's practices, not the industry's standard practices (id. at 7). SELP further argues that Mr. Chiano's testimony cannot support the motion for summary judgment because it is "unlikely" to be admissible in evidence, particularly because Fibertech refuses to

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[6] SELP argues that it was not obligated to address to the issue of industry practice in its opposition to Fibertech's motion for summary judgment because Fibertech did not raise that issue in the motion (Opposition at 9). In addition, SELP reiterates arguments that it presented in its Response to Fibertech's Motion for Summary Judgment at 14-15, arguing that because Fibertech failed to produce discovery responses pertaining to the nature of its business, SELP does not have any information with which to respond to Fibertech's new arguments based on Mr. Chiano's testimony (Opposition at 9-10, citing Mass. R. Civ. P. 56(f)).

answer discovery requests, which the Department has deemed relevant, and which are directed toward the assertions made in Mr. Chiano's testimony (id., citing 220 C.M.R. § 1.06(6)(e); Interlocutory Order at 43-46; Mass R. Civ. P. 56(f)). Finally, SELP argues that the facts that Fibertech has not followed the law in seeking authorization to construct lines under G.L. c. 166, §§ 21 and 22, and that no one has challenged Fibertech on this issue in the past, are not relevant to the question of law presented: whether Fibertech must be authorized to construct lines in the public ways in order to qualify as a "licensee" under G.L. c. 166, § 25A (Opposition at 8).

SELP counters Fibertech's assertion that the Department is mistaken "to assume that the grant of a pole attachment license confers actual access, and not just the right of access as against the utility" (Opposition at 11, citing Motion at 6). SELP argues that there is no such thing as a generic right of access claim under the pole attachment statute, G.L. c. 166, § 25A, and the Department's regulations, 220 C.M.R. § 45.00 et seq. (Opposition at 11). SELP suggests that if this were the case, a pole attachment applicant first would have to file a "generic right of access petition," and then, if a utility pole owner denied a specific pole attachment request, would have to file a second petition for review of a denial based on engineering safety or reliability standards (id. at 11). SELP maintains that this is not the case; rather, under the pole attachment statute and the Department's regulations, the Department only reviews specific rates, terms, and conditions and specific denials of access, as well as disputes arising from modifications to previously constructed attachments (id.).

B. Analysis and Findings

We first address SELP's procedural argument that reconsideration of an interlocutory order is not permitted. An order for partial summary judgment is interlocutory in nature. Acme Engineering & Mfg. v. Airadyne Co., 9 Mass. App. 762, 764 (1980); see also Rollins Envtl. Servs., Inc. v. Superior Court, 368 Mass. 174, 177-80 (1975) (holding that denial of motion for summary judgment is interlocutory). The Department has repeatedly held that 220 C.M.R. § 1.11(10) limits reconsideration to final Department orders, not to interlocutory orders. E.g., UNE Rates, D.T.E. 01-20, at 3, Interlocutory Order (October 18, 2001). We denied Fibertech's motion for summary judgment, in part, on the issue of whether Fibertech may qualify as a "licensee." Interlocutory Order at 24. Therefore, reconsideration of the Interlocutory Order on this point would not ordinarily be available. Granting reconsideration of an interlocutory order would be a considerable departure from both our procedural rules and past precedent, and would require, at a minimum, a strong showing that such a departure is not merely reasonable, but necessary for the orderly administration of this proceeding.[7] UNE Rates, D.T.E. 01-20, at 3-4, Interlocutory Order (October 18, 2001).

The Department has denied reconsideration when the request rests on an issue presented for the first time in a motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987). To promote administrative efficiency, the Department

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[7] Under 220 C.M.R. § 1.01(4), "where good cause appears, not contrary to statute, the Commission and any presiding officer may permit deviation from 220 C.M.R. 1.00." Resort to 220 C.M.R. § 1.01(4) is, of course, done sparingly. UNE Rates, D.T.E. 01-20, at 4 n.4, Interlocutory Order (October 18, 2001).

requires parties to raise all facts and issues material to their motions, rather than holding back one theory to await the outcome of other theories. Fibertech has not shown why it could not have raised the issue of industry custom and practice earlier. Therefore, the motion for reconsideration on the grounds that the Interlocutory Order is contrary to industry custom and practice must be denied.

Even if we were to reconsider the Interlocutory Order in light of the pre-filed testimony of Mr. Chiano now highlighted, we would not find that the Interlocutory Order was a result of mistake or inadvertence. We have already considered the testimony provided, as well as the aerial and conduit license agreements produced in discovery. Interlocutory Order at 6. We noted that these agreements referred to the term, "license," but that "[n]either party claims that the term 'license' in these agreements is used in the same manner as the type of license that would qualify Fibertech as a 'licensee' under G.L. c. 166, § 25A, nor does the Department consider them equivalent." Interlocutory Order at 6 n.6. Even if Fibertech now clarifies that it does in fact contend that the usage is equivalent and that the industry custom and practice is to enter into a pole attachment agreement first, reconsideration is unwarranted because we have already considered this point.

The Department has authority to determine and enforce reasonable pole attachment rates, terms, or conditions "in any case in which the utility and licensee fail to agree." G.L. c. 166, § 25A. As a corollary, we note that a company that is a "licensee," pursuant to G.L. c. 166, § 25A, i.e., having received local authorization to construct lines across public

ways, could maintain a properly filed pole attachment complaint without having entered into a pole attachment agreement with the utility.

It makes no difference that putative licensees may in fact enter into pole attachment agreements with utilities prior to obtaining local construction authority from municipalities. Parties are free to enter into agreements that facilitate the process of applying for all necessary regulatory approvals. Nothing in G.L. c. 166, §§ 21 and 22, suggests that having a pole attachment agreement is relevant to whether a proposed line will "incommode the public use of public ways or endanger or interrupt navigation." Neither G.L. c. 166, § 25A nor the Interlocutory Order require parties to enter into the pole attachment agreements prior to obtaining all necessary local regulatory approvals. We disagree with Fibertech's assertion that it cannot seek construction locations from municipalities without having conducted field surveys and preparing make-ready estimates under a pole attachment agreement (Fibertech Comments at 11). The lack of a pole attachment agreement does not prevent a carrier from conducting field surveys on its own.

Even if, arguendo, the standard agreements that Fibertech produced do demonstrate industry custom,[8] the agreements recognize that a company without municipal authorization to construct wires across public ways does not have a right to attach to poles. For example, the Verizon standard aerial agreement provides: "Licensee shall be responsible for obtaining from the appropriate public and/or private authority any required authorization to construct, operate

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[8] The existence and scope of a usage of trade are questions of fact. See Restatement (Second) of Contracts § 222(2) (1981); DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 103, 449 N.E.2d 1189 (1983).

and/or maintain its attachment on public and private property at the location of Licensor's poles which Licensee uses and shall submit to Licensor evidence of such authority before making attachments on such public and/or private property" (SELP-1-3 (Aerial License Agreement (Mar. 7, 2000), Art. VI) (emphasis added)). The agreement further provides that "[a]ny license issued under this Agreement shall automatically terminate when Licensee ceases to have authority to construct, operate and/or maintain its attachments on the public or private property at the location of the particular pole covered by the license" (SELP-1-3 (Aerial License Agreement, Art. X)).

Whatever the industry usage and practice regarding the terms "license" and "licensee" in those agreements may be, applicants do not transform themselves into "licensees," pursuant to G.L. c. 166, § 25A, upon entering into aerial and conduit license agreements or upon issuance of a "license" (per the alleged industry usage of the term) from a utility to attach to its facilities. A company incorporated for the transmission of intelligence becomes a "licensee," for the purposes of G.L. c. 166, § 25A, upon obtaining construction authority from the municipality where the company seeks to construct its facilities.

Moreover, the industry's general usage and practice regarding the municipal licensing process is not relevant to the question of whether a carrier is authorized to construct in a particular municipality. Whether the Department considers a carrier to have been properly authorized to construct lines across public ways in a town depends upon the process that the particular municipality has in place. Some municipalities may not require approval. In such cases, we would consider that carrier to be a licensee for the purpose of G.L. c. 166, § 25A

upon the carrier's request for access to the utility's poles or conduits. But the municipality's permitting process is a fact that must be demonstrated, and it is clear that Shrewsbury does require carriers to apply for construction permits. It is undisputed that Fibertech has a petition for a grant of location pending before the Board of Selectmen and that the petition has not been acted upon. The record indicates that the Board of Selectmen is, at a minimum, reviewing whether the Department considers Fibertech to be incorporated for the transmission of intelligence (Motion for Summary Judgment, att. 13, at 1).

Finally, we reject Fibertech's contention that the Interlocutory Order is contrary to the Department's certification to the FCC that we regulate nondiscriminatory access to poles (see Motion at 7). Fibertech is correct that the federal pole attachment statute is silent as to local right-of-way permitting, but we do not infer from this silence that a pole attachment applicant may be entitled to access without regard to local right-of-way permitting requirements. Fibertech concedes that 47 U.S.C. § 253 preserves local authority for right-of-way permitting (Motion at 7 n.5). Section 253 provides that state or local regulation may not "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," 47 U.S.C. § 253(a), but this does not "affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," 47 U.S.C. § 253(b), nor does it affect "the authority of a State or local government to manage the public rights-of-way . . . ." 47 U.S.C. § 253(c). Recognizing local authority to manage rights-of-way

therefore would not necessarily contravene our certification to the FCC that we regulate nondiscriminatory access to poles as Fibertech claims. So long as municipalities impose permitting requirements on a "competitively neutral and nondiscriminatory basis" to manage public rights of way, "telecommunications providers" have the same recourse under either the federal or the Massachusetts pole attachment statutes. See 47 U.S.C. § 253(c).

IV. INCORPORATION FOR TRANSMISSION OF INTELLIGENCE

A. Positions of the Parties

1. Fibertech

Fibertech argues that the Department must clarify what facts Fibertech must demonstrate for the Department to determine whether Fibertech is incorporated for transmission of intelligence, given the Department's ruling that "[Fibertech's] dark fiber is a 'wire or cable for transmission of intelligence by telegraph, telephone or television,' and thus, . . . dark fiber qualifies as an 'attachment' under G.L. c. 166, § 25A' " (Motion at 8, citing Interlocutory Order at 28). Fibertech states that it is "at a loss as to what further it must establish other than that it provides dark fiber" (Motion at 8). Fibertech argues that if the Interlocutory Order found that there remains a question of fact based on SELP's contention that the record is unsubstantiated as to the nature of Fibertech's business, then the Department incorrectly applied the summary judgment standard (id., citing Kourouvacilis v. General Motors Corp., 410 Mass 706 (1991)). Fibertech argues that once it submitted the testimony of its chief operating officer stating that Fibertech is in the business of providing dark fiber, "the burden shifted to SELP to 'show with admissible evidence the existence of a dispute as to

material facts'" (id., citing Kourouvacilis, 410 Mass. at 711; Godbout v. Cousens, 396, Mass. 254, 261 (1985)). Fibertech argues that it has no burden to corroborate uncontroverted testimony, and that SELP had the burden to establish a question of fact with evidence, not mere allegations (Motion at 9, citing Mass. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). Fibertech further argues that SELP's claim that it is "nothing more than a construction company building dark fiber on a speculative basis with no customers currently paying for any 'service' or leasing any fiber," is too speculative to establish a question of fact that would defeat its motion for summary judgment (Motion at 9, citing Interlocutory Order at 15, quoting SELP Response to Fibertech Motion for Summary Judgment at 2, 10).

Fibertech similarly reasons that SELP's pending discovery requests would not establish a question of fact. Fibertech states that by rejecting the theory that Fibertech is not a "licensee" because it does not operate as a common carrier and provides unlit fiber, the Department has "resolved the central premise on which SELP denied access to its poles" (Motion at 10). Therefore, Fibertech argues that SELP's discovery amounts to a fishing expedition (id.). Fibertech maintains that telecommunications providers should not be "forced to turn over customer lists, agreements, and information about customers' business as a threshold for obtaining attachments" (id., citing Marcus Cable Assoc., L.P., FCC P.A. No. 96-002, ¶¶ 22, 24 (rel. July 21, 1997)). Further, Fibertech argues that new market entrants may face an impossible burden of proof if they must demonstrate "actual service," and that new facilities-based entry would be impossible under such a standard.

Notwithstanding the showing that the Department concluded Fibertech had to demonstrate regarding the nature of its business, Fibertech argues that the Telecommunications Division's Wholesale Tariffing Memorandum[9] changes the significance that the Interlocutory Order had ascribed to filed tariffs (Fibertech Comments at 3). According to Fibertech, the Department stated that the filing of a statement of business operations and an initial tariff " 'does not involve a finding that the company is engaged currently in the transmission of intelligence' because of pro forma tariff filings of tariffs by companies that 'never do become operational' " (id. at 8, quoting Interlocutory Order at 18). In contrast, Fibertech maintains that the Wholesale Tariffing Memorandum does involve such a finding, because the Department now requires tariff filings to indicate that the tariffed service "is either currently available, available within a specified time, or available subject to specific regulatory approvals," and because the Department now rejects tariffs that do not meet this requirement (id., quoting Wholesale Tariffing Memorandum at 9).

Fibertech argues that filing M.D.T.E. 3 is the functional equivalent of a showing that it has "formulated a definite business plan" (id., citing Interlocutory Order at 43). Further, Fibertech argues that because the Department defines services that are subject to tariffs as

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[9] Although Fibertech incorrectly characterizes the Wholesale Tariffing Memorandum as a commission order, this directive to all carriers was properly issued and is in force pursuant to the Telecommunications Division's authority to administer and enforce tariff filing requirements under G.L. c. 25, § 12E½ (cf. Fibertech Comments at 2). Thus, the Wholesale Tariffing Memorandum puts carriers on notice that they are obligated to file tariffs for wholesale telecommunications services, if they offer such services as common carriage. The Wholesale Tariffing Memorandum also notifies all carriers about the change in the Telecommunications Division's practices in reviewing filed tariffs before permitting those tariffs to become effective.

"allowing customers to transmit intelligence of their own design and choosing," the fact that the Department approved M.D.T.E. 3 indicates that the services involve the transmission of intelligence (id.). Thus, Fibertech argues that carriers that are subject to tariffing requirements are by definition carriers that render services that include transmission of intelligence, and further, that there is no basis for distinguishing the phrase "transmission of intelligence" in G.L. c. 159, § 12 and as it is used in G.L. c. 166, § 21 (id. at 9).

Moreover, Fibertech emphasizes that the services offered under M.D.T.E. 3 are wholesale "lit" fiber services (id.). Fibertech states that SELP has never contended that lit fiber services are not "transmission of intelligence (id.). Fibertech argues that whatever residual questions of fact there might be with respect to Fibertech's dark fiber service, Fibertech's offering of its lit fiber services makes it just like many other carriers in Massachusetts that offer transmission of intelligence (id.).

2. SELP

SELP argues that Fibertech's motion for clarification of facts in dispute does not meet the Department's standard of review in considering clarification of previously issued orders (Opposition at 12). SELP argues that the Department will clarify orders only when such orders are silent as to the disposition of a specific issue that must be determined, or when such orders contain language that is so ambiguous as to leave doubt as to its meaning (id.). SELP maintains that the Interlocutory Order is not silent as to the issues raised by Fibertech's Complaint and Motion for Summary Judgment and which must be determined under G.L. c. 166, § 25A and 220 C.M.R. § 45.00 et seq. (id. at 13). Rather, SELP states, the

Interlocutory Order addresses both whether Fibertech is a "licensee" and whether dark fiber is an "attachment" (id. at 14). SELP further argues that in order to obtain "sufficient evidence on the nature of Fibertech's business," the Department "clearly directs Fibertech to submit responses to specifically enumerated information requests" (id.). SELP argues that Fibertech cannot "magically transform the Department's somewhat generic finding regarding dark fiber into a finding that Fibertech is in the business of doing anything" in order to demonstrate that the Interlocutory Order is ambiguous as to what Fibertech must prove to show that it is incorporated for the transmission of intelligence (id. at 15-16). SELP asserts that Fibertech's motion for reconsideration and clarification is simply a procedural tactic to avoid production of documents which are at the core of this proceeding (id. at 16). Therefore, SELP requests that the Department order Fibertech to produce the requested documents by a date certain and make it clear that failure to produce these documents will result in dismissal of Fibertech's Complaint (id. at 17).

SELP contends that the Wholesale Tariffing Memorandum did not alter the Department's ruling that the filing of a statement of business operations and a rate tariff is not tantamount to a finding that a company is actually in the business of transmitting intelligence as required by G.L. c. 166, § 21 (SELP Comments at 6). SELP argues that the Wholesale Tariffing Memorandum itself does not make any "findings," and further that Fibertech cannot derive a "finding" from this document because its was neither issued by the Commission nor issued in the context of an adjudicatory proceeding (id. at 7-8, citing G.L. c. 25, § 5; 220 C.M.R. §§ 1.07, 1.11).

Moreover, SELP argues that the Wholesale Tariffing Memorandum imposes new requirements for the filing of wholesale tariffs (id. at 6). SELP maintains that the Department now requires companies to indicate whether wholesale services as "either currently available, available within a specified time frame, or available subject to specific regulatory approvals" (id., quoting Wholesale Tariffing Memorandum at 9). Further, SELP states that carriers "must indicate their plans for offering such service in their transmittal letters and initial statements of business operations . . . and in timely amendments," and that "tariffs for such services will be rejected where no time frame or specific regulatory milestones for the offering of such services are indicated" (id., quoting Wholesale Tariffing Memorandum at 9).

SELP argues that Fibertech has failed to comply with the requirements of Wholesale Tariffing Memorandum (id. at 8). SELP states that neither M.D.T.E. 3, nor Fibertech's transmittal letter, nor Fibertech's statement of business operations includes a statement that the tariffed services are "either currently available, available within a specified time frame, or available subject to specific regulatory approvals" (id.). SELP argues that the Wholesale Tariffing Memorandum appears to require the Department to reject M.D.T.E. 3, and that the memorandum is not a "free pass" for an "automatic 'finding' that any company which files an intrastate wholesale tariff is engaged in the business of transmitting intelligence regardless of whether that company actually complies with the Department's tariff-filing requirements" (id. at 8-9) (emphasis in original).

SELP argues that "[t]he only thing that has changed by virtue of [the Wholesale Tariffing Memorandum] is who must keep tariffs on file with the Department: an entity that

may provide intrastate wholesale services now must file tariffs with the Department" (id. at 10 (emphasis in original)). SELP notes that in the Interlocutory Order, the Department rejected Fibertech's argument that its filed retail tariff demonstrated that it was a company engaged in the transmission of intelligence (id., citing Interlocutory Order at 18-19). SELP argues that the same ruling applies to Fibertech's wholesale tariff (id.). SELP maintains that rather than amounting to a "finding" that the filing and approval of a wholesale tariff leads automatically to a finding that a company is incorporated for the transmission of intelligence or engaged in interstate commerce, the Wholesale Tariffing Memorandum merely describes "the indicia of 'common carrier' status (id. at 10-11, citing G.L. c. 166, § 21; Wholesale Tariffing Memorandum at 5-6).

Finally, SELP emphasizes that authorization to provide tariffed services, whether on a wholesale or retail basis, is not proof of authority to construct lines over the public ways (id. at 11, citing Interlocutory Order at 18). SELP argues that the Wholesale Tariffing Memorandum does not affect the fact that as a matter of law, authorization to construct lines in the public ways must come from the municipality (id., citing G.L. c. 166, § 22). SELP maintains that even if Fibertech could show that it is incorporated for the transmission of intelligence, Fibertech must still obtain a grant of location from the Board of Selectmen (id., citing Interlocutory Order at 21). SELP argues that the Board of Selectmen in Shrewsbury have a role in the process as dictated by the Legislature, and although "the Board of Selectmen may well be waiting until the Department makes a finding on the issue of whether Fibertech is a company incorporated for the transmission of intelligence before proceeding on Fibertech's

petition under G.L. c. 166, § 22, the Department's actions in this case do not supercede the municipality's processes" (id. at 12).

B. Analysis and Findings

Because we have ruled that "licensee" status depends on whether a carrier has obtained local construction authority, a "finding" on the nature of Fibertech's business is not material to the ultimate disposition of this case under G.L. c. 166, § 25A. The question of whether a company is incorporated for transmission of intelligence should not be raised in a pole attachment dispute before the Department if that company has obtained local construction authority. We review this question today only because the parties have suggested that the Board of Selectmen may be waiting for our statement before it acts on Fibertech's petition for construction authority (see SELP Comments at 12; see also Motion for Summary Judgment, att. 13, at 1). We note that SELP advised the Board of Selectmen that Fibertech "does not meet the [Department's] criteria to mandate pole attachments from SELP" and that, therefore, Fibertech is not entitled to a grant of location (Motion for Summary Judgment, att. 13, at 1). In fact, the Department had not made such a finding, nor had the Department passed on the question of when a company may be considered to be incorporated for the transmission of intelligence. Thus, we comment on our treatment of filed tariffs today in order to assist the Board of Selectmen of Shrewsbury in conforming its right-of-way review process to state and federal policy regarding the classification of telecommunications carriers.

Because the issue is not material to the pole attachment dispute itself, we apply the summary judgment standard only to illustrate the facts that were presented to demonstrate

whether Fibertech is incorporated for transmission of intelligence. A party moving for summary judgment has the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings by showing that there is "an absence of evidence to support the non-moving party's case." Kourouvacilis, 410 Mass. at 711-12, citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party meets its burden, the burden shifts to the opposing party who may not rest on mere allegations but must demonstrate the existence of a dispute as to the material facts with "admissible evidence." Kourouvacilis, 410 Mass. at 711-12; Mass R. Civ. P. 56(e).

Prior to the filing of M.D.T.E. 3, Fibertech's sole offer of proof that it is incorporated for the transmission of intelligence was the testimony of its own chief operating officer, Frank Chiano, who alleged that the company "provides" dark fiber. Fibertech did not explain how Mr. Chiano's testimony alone demonstrates that proof of SELP's position was unlikely to be forthcoming after hearing. See 410 Mass. at 714. The burden of production did not shift to SELP to demonstrate that there is a genuine question of material fact as to whether Fibertech is incorporated for the transmission of intelligence merely because Fibertech filed a motion for summary judgment stating that SELP produced no evidence to prove an essential element of its case. See id. Mr. Chiano's testimony that Fibertech "provides" dark fiber was a conclusory statement and was insufficient by itself to support Fibertech's motion. Fibertech did not establish its burden in the first instance to demonstrate an absence of evidence supporting SELP's position.

At the same time, Fibertech failed to produce discovery responses pertaining to the transmission of intelligence that it claimed to provide. The Department found that the information that SELP requested in discovery was relevant to this issue.[10] Interlocutory Order at 43. SELP's offer of what it intends to prove with the requested discovery materials was not speculative but pertained to specific information requests. We cannot determine whether Fibertech was correct that the dark fiber leases that it offers constitute "services" for transmission of intelligence because Fibertech offered no evidence on this point for the Department's review.

In ruling that dark fiber may itself qualify as an "attachment" under G.L. c. 166, § 25A, we did not make any findings to suggest that Fibertech qualifies as a "licensee" or that it is "incorporated for the transmission of intelligence." In fact, we distinguished the issues explicitly, holding that "[t]he question of who may place attachments on poles, i.e., licensees, does not affect the analysis of what licensees may place on poles, i.e., attachments." Interlocutory Order at 29 (emphasis in original). The converse is also true. Although we had rejected "common carrier" status as a factor in determining whether a company is incorporated

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[10] Mr. Chiano's testimony that Fibertech "provides" or "leases" dark fiber was conclusory and did not describe the offering with detail sufficient to demonstrate that Fibertech is offering a dark fiber "service." The necessary showing was not a high hurdle. A description of the service with the same level of detail necessary to support a common carrier tariff would have been sufficient to meet Fibertech's burden of production. An actual common carrier tariff filing is not necessary if Fibertech offers its alleged service as private carriage, but Fibertech still had to describe its service with the same detail. Although the requested discovery seeks information in greater detail than what Fibertech would need to demonstrate in order for it to prevail on this issue, the discovery was reasonably calculated to lead to admissible evidence, because Fibertech offered no description of its service at all.

for the transmission of intelligence, we did not resolve the question of whether Fibertech was incorporated for the transmission of intelligence. Fibertech had to demonstrate that the "leases" that it claims to offer do in fact constitute "services" for transmission of intelligence.

The Wholesale Tariffing Memorandum, however, alters the Telecommunications Division's practices in determining whether to require or permit common carriers tariffs to be filed and become effective, and, therefore, the policy change warrants our reconsideration of whether common carrier status is dispositive of whether a company is in the business of transmission of intelligence. In the Interlocutory Order, we observed that the Department did not have a requirement that a new registrant be engaged currently in the transmission of intelligence in order to maintain its common carrier registration.[11] Interlocutory Order at 18. This was merely an artifact of the Department's then-practice of accepting placeholder tariffs from companies that register in advance of doing business within Massachusetts, although some of those companies did not actually become operational. Id. Common carrier registration, therefore, did not establish that a company is currently in the business of transmission of intelligence.

This is no longer the Telecommunications Division's practice. Because the test of common carriage turns on the manner in which services are offered, a carrier must presently

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[11] Fibertech mischaracterizes the showing that a new market entrant has to make in demonstrating that it is in the business of transmission of intelligence. We do not require new market entrants to demonstrate that they provide "actual service" or that they currently have customers. See Interlocutory Order at 18; (cf. Motion at 10). All that a new entrant has to demonstrate is it offers a service for transmission of intelligence in order to be considered incorporated for transmission of intelligence. This remains true under the NARUC I test.

offer telecommunications services in order to be considered to be a common carrier. That is, the Department no longer accepts filed tariffs if the carrier in question will not offer telecommunications services within a determinate period. We recognize that new market entrants that do not offer services available today may, nevertheless, be considered incorporated for transmission of intelligence, if they can hold themselves out to the public today to offer services that will be available on a future date certain, or subject to specific regulatory approvals. Wholesale Tariffing Memorandum at 9. Because the Department no longer permits carriers to submit placeholder tariffs, we may now consider registered carriers with effective tariffs for common carriage to be incorporated for the transmission of intelligence.

SELP is correct that the Wholesale Tariffing Memorandum provides a description of the indicia of common carrier status and describes who must file tariffs, but it is the filed tariff becoming effective that gives rise to a carrier's legal authorization to offer tariffed services and requisite obligation to provide those services according to the terms of the tariff to the extent of their facilities upon request, as well as to comply with all other obligations of common carriers.[12] This authorization and obligation is self-executing within thirty days of filing under G.L. c. 59, §§ 19 and 20, unless the Department orders otherwise.

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[12] See, e.g., G.L. c. 166, § 11 (obligating common carriers to file annual returns, which includes a current statement of business operations and intrastate revenues and expenditures, in a format required by the Telecommunications Division); Proceeding by the Department of Telecommunications and Energy on its own Motion to Develop Requirements for Mass Migrations of Telecommunications Service End-Users, D.T.E. 02-28 (2002) (establishing procedures for market exit).

Unless the tariff indicates otherwise, the service is required to be immediately available. The Wholesale Tariffing Memorandum does not require a tariff to indicate in a separate certificate that a service is available now, because current availability is the plain meaning of an unqualified offer to provide service. Fibertech's M.D.T.E. 3 constitutes an unqualified offer to provide services that are currently available to the public, not merely at some point in the future. Thus, Fibertech is incorporated for transmission of intelligence.

SELP's contention that Fibertech, having failed to update its statement of business operations, has not complied with the terms of the Wholesale Tariffing Memorandum does not affect the Department's classification of Fibertech as a common carrier that is obligated to provide tariffed services upon request. Indeed, Fibertech is still obligated to update its statement of business operations to indicate the current types of services offered.[13] We direct Fibertech to update its statement of business operations within thirty days of this Order.

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[13] We note that we note Fibertech's current Statement of Business Operations indicates that retail local exchange services will be available "as market conditions and economics dictate" (Fibertech Statement of Business Operations at § 7). Although the Telecommunications Division has not yet directed carriers to withdraw placeholder tariffs for retail services, we expect that Fibertech ultimately will be required to withdraw its tariffs for local exchange services, M.D.T.E. 1, unless Fibertech can state when those services will be available. Further, the Statement of Business Operations indicates that Fibertech is "currently in the process of selecting the locations of its facilities" and that Fibertech "will provide the Department updated information as required" (Fibertech Statement of Business Operations at § 6). This is an inadequate response. Fibertech must update the locations of its facilities that currently have been planned or have been constructed.

V. CONCLUSION

We have reviewed the nature of Fibertech's services only because the Board of Selectmen has not taken action on Fibertech's petition for a grant of location, and we have reason to believe that the Board of Selectmen may be awaiting the Department's views on this issue (see SELP Comments at 12; see also Motion for Summary Judgment, att. 13, at 1). The Department is concerned that the arguments presented by SELP to the Board of Selectmen regarding the nature of Fibertech's business may vitiate the Department's pole attachment dispute resolution process (see Motion for Summary Judgment, att. 13, at 1). Without guidance from the Department on whether registered common carriers should be considered incorporated for the transmission of intelligence, the risk is that municipal permitting boards will create a patchwork of regulatory policy regarding the classification of common carriers, inadvertently reaching beyond traditional right-of-way matters and, in effect, imposing entry regulation of telecommunications services, which we have rejected.[14] See, e.g., New England Tel. & Tel. Co. v. City of Brockton, 332 Mass. 662, 668 (1955) (holding that ratemaking power over carriers is "subject to the authority of the State"); Regulatory Treatment of Telecommunications Common Carriers Within the Commonwealth of Massachusetts, D.P.U. 93-98, at 12 (1994) (eliminating entry regulation); cf. TCI Cablevision of Oakland

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[14] This Order does not address the showing that a private carrier of telecommunications services must make. We have stated, however, that "we are not establishing a general requirement that pole attachment applicants must first seek a finding from the Department that they are in the business of transmission of intelligence before they may be considered to be qualified to apply for municipal grants of location." Interlocutory Order at 25 n.23.

County, Inc., ¶¶ 103-10, CSR-4790, Memorandum of Opinion and Order, FCC 97-331 (rel. Sept. 19, 1997) (noting that redundant "third-tier" regulations imposed by municipalities that go beyond management of public rights-of-way may be unjustified under 47 U.S.C. § 253(c) and "will be met with close scrutiny by the Commission").

We reaffirm, however, that we consider the administration of the public rights-of-way generally to be a local matter under Massachusetts law. Moreover, we are not asserting jurisdiction to review the Board of Selectmen's ultimate decision on whether to grant Fibertech authority to construct facilities in Shrewsbury. Any appeal or further action on that decision should be taken to the appropriate courts, or to the FCC, where applicable, but not to the Department.

Having clarified that we consider registered carriers with effective common carrier tariffs on file to be incorporated for transmission of intelligence, it is no longer necessary for the Department to investigate the nature of Fibertech's business in this proceeding. The parties are correct, however, that this does not affect the underlying issue of whether Fibertech is a "licensee" under G.L. c. 166, § 25A. In that regard, the filing of M.D.T.E. 3, which is now effective, has not changed our ruling that "the Department cannot rule on the ultimate question of whether Fibertech is entitled to access to attachments in Shrewsbury until the Board of Selectmen acts on Fibertech's petition for a grant of location." Interlocutory Order at 24-25. It would be premature to consider granting relief on Fibertech's underlying pole attachment complaint unless and until the Board of Selectmen has granted local construction authority to Fibertech or the appropriate forum has ordered issuance of construction authority.

Interlocutory Order at 24. Therefore, we enter summary judgment against Fibertech and dismiss the complaint, because Fibertech is not currently a "licensee" as a matter of law, for the purpose of G.L. c. 166, § 25A. See Mass. R. Civ. P. 56(c). It remains to be seen whether Fibertech may choose to file a new pole attachment complaint against SELP, if it obtains authorization to construct lines across public ways in Shrewsbury, and if SELP does not approve attachments within 45 days of Fibertech's requests. Because the Department is dismissing the proceeding, the pending discovery disputes are moot.

VI. ORDER

After due consideration, it is

ORDERED that Fibertech's Motion for Reconsideration and Clarification is DENIED in part, and GRANTED in part in accordance with this Order; and it is

FURTHER ORDERED that Fibertech shall update its Statement of Business Operations to be filed within thirty days of this Order; and it is

FURTHER ORDERED that the investigation into whether Fibertech is incorporated for the transmission of intelligence is DISMISSED and it is

FURTHER ORDERED that summary judgment enter against Fibertech on the issue of whether Fibertech is currently a "licensee" under G.L. c. 166, § 25A; and it is

FURTHER ORDERED that Fibertech's complaint is DISMISSED; and it is

FURTHER ORDERED that the orders compelling Fibertech to produce discovery responses in this proceeding are VACATED as moot.

By Order of the Department,

/s/
Paul G. Afonso, Chairman

/s/
W. Robert Keating, Commissioner

/s/
Eugene J. Sullivan, Jr., Commissioner

/s/
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order, or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order, or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order, or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5 Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).